

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of Resident Insurance
Producers' License of Steven W. Schmidt,
License No. 655330

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

The above-entitled matter came before Administrative Law Judge Barbara Case (ALJ) for a hearing on November 14, 2013. The record closed on November 29, 2013.

Oliver J. Larson, Assistant Attorney General, appeared on behalf of the Minnesota Department of Commerce (Department). Robert E. Mathias, Mathias Law Firm, appeared on behalf of Steven W. Schmidt (Respondent).

STATEMENT OF THE ISSUES

1. Whether Respondent violated Minnesota insurance laws; improperly misappropriated or converted money received in the course of doing insurance business; and used fraudulent, coercive, or deceptive practices, or demonstrated incompetence, untrustworthiness, or financial irresponsibility in violation of Minn. Stat. § 60K.43, subd. 1(2), (4) and (8) (2012).

2. Whether Respondent engaged in an act or practice which demonstrates that Respondent is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the license issued by the Commissioner in violation of Minn. Stat. § 45.027, subd. 7(a)(4) (2012).

3. Whether Respondent failed to observe high standards of commercial honor and just and equitable principals of trade in the conduct of Respondent's insurance business in violation of Minn. R. 2795.1000 (2011).

SUMMARY OF CONCLUSION

The Department proved, by a preponderance of the evidence, that the Respondent demonstrated untrustworthiness, dishonest practices, and misappropriation of funds by withholding funds either through the improper taking of loans or conversion.

FINDINGS OF FACT

1. The procedural documents in this matter reflect that the Respondent is a licensed insurance agent in the state of Minnesota with license number 655330. Respondent appeared at the hearing and was represented by counsel. Respondent did not testify.

2. Marilyn Starstead, the only witness called to testify at the hearing, was a customer of the Respondent's insurance business from the year 2002 until the present. At the time of the hearing Ms. Starstead was 67 years of age.¹

3. Prior to 2002, Ms. Starstead's husband, Gary Starstead, handled their finances and did business with Respondent. In that context Ms. Starstead had briefly met Respondent prior to 2002.²

4. In 2002, Ms. Starstead's husband died. While going through her husband's papers, Ms. Starstead located a business card for Respondent. Ms. Starstead called Respondent and informed him of her husband's death. Respondent stated that Ms. Starstead was the beneficiary of a life insurance policy held by her husband. Thereafter, Ms. Starstead met with Respondent and agreed to invest the proceeds of the policy, along with money from other policies, with Respondent. Subsequently, Ms. Starstead also invested the proceeds from the sale of her home with Respondent.³

5. Ms. Starstead relied on Respondent to invest her assets on her behalf. Until recently, Ms. Starstead followed Respondent's recommendations concerning all aspects of the timing and nature of the investments.

6. At Respondent's direction, Ms. Starstead invested in several annuities, initially with a company named American Equity and later with a company named Allianz. Respondent urged her to switch her investments from American Equity to Allianz although he had previously told her the money was earning "good interest" with American Equity. A representative of American Equity expressed surprise at Ms. Starstead's withdrawal of the money and subsequently Respondent counseled her against speaking with that representative, or with anyone, about her investments.⁴

7. Periodically, Ms. Starstead would receive checks from American Equity or Allianz resulting from the surrender of policies or from loans against the policies.⁵

¹ Testimony of Marilyn Starstead.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

8. Where Ms. Starstead surrendered or took loans from her annuity policies, she did so at the direction of Respondent. Respondent did not inform Ms. Starstead that the loans and surrender of policies had tax implications.⁶

9. Respondent handled the preparation and filing of Ms. Starstead's tax returns. Initially, Ms. Starstead and Respondent jointly met with a tax preparer for this purpose. After the first year, Ms. Starstead provided records to the Respondent who met with the tax preparer. Prior to 2011, Ms. Starstead was unaware of any adverse tax implications caused by the surrender of annuity policies or loans taken out against them. Ms. Starstead later learned that the policy loans resulted in taxable events.⁷

10. On October 29, 2004, Ms. Starstead wrote Respondent a check for \$10,000 for investment on her behalf.⁸

11. On October 15, 2007, Ms. Starstead wrote Respondent a check for \$20,000 for investment on her behalf.⁹

12. On November 19, 2007, Ms. Starstead wrote Respondent a check for \$39,258 for investment on her behalf.¹⁰

13. On November 15, 2008, Ms. Starstead wrote Respondent a check for \$35,000 for investment on her behalf.¹¹

14. To the best of her recollection, sometime in 2010 Ms. Starstead met with a professional concerning the preparation of a living will. The professional reviewed her financial records and expressed concern with the manner in which Respondent had received and invested Ms. Starstead's money. He also expressed concern about the loans Ms. Starstead had taken out against the annuities.¹²

15. To the best of her recollection, sometime in 2010 Ms. Starstead met with professionals working for her credit union, who expressed concern over the manner in which Respondent had received and invested Ms. Starstead's money. They also expressed concern about the tax implications of the loans she had taken against the annuities. These professionals recommended that Ms. Starstead retain an attorney.

16. Thereafter, Ms. Starstead retained an attorney, Dennis Cochrane, and an accountant, Roger Peterson, to review her investments.¹³

⁶ *Id.*

⁷ *Id.*

⁸ Exhibit 1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

17. Through her attorney, Ms. Starstead requested that Respondent identify the manner in which the four checks set forth in paragraphs 8-11 above (hereinafter "the funds at issue") had been invested, and to return the funds at issue to her. Respondent claimed he was unable or unwilling to identify the location of the funds at issue, and has not returned them.¹⁴

18. Respondent presented no evidence at the hearing concerning the location of the funds at issue. He did not deny that he retains the funds at issue.

19. When asked by the attorney for an explanation of what happened to the funds, Respondent represented to the attorney that the funds at issue were a loan from Ms. Starstead to Respondent.¹⁵

20. Though asked by the attorney to return the funds at issue to Ms. Starstead, the Respondent has not returned the funds to her.¹⁶

21. Ms. Starstead testified that she made no loans to Respondent.¹⁷

22. Ms. Starstead provided confusing testimony regarding what financial statements she received from Respondent. She testified that she had received some statements but that she did not understand them or recall their contents.¹⁸

23. Ms. Starstead provided unclear testimony regarding the current amount of money, if any, that she has invested with the Respondent. She was unable to place a dollar amount on what remains, if any, of these investments. She was unable to place a dollar amount on what was lost, if any, of these investments.¹⁹

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Commissioner of the Department of Commerce (Commissioner) and the Office of Administrative Hearings have jurisdiction to consider this matter pursuant to Minn. Stat. § 45.027, subds, 6, 7, and 11 (2012), Minn. Stat. § 60K.43 (2012), and Minn. Stat. § 14.50 (2010).

2. The Commissioner timely served upon Respondent a Notice of Hearing pursuant to Minn. Stat. § 14.50 (2012).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

3. Respondent received due, proper, and timely notice of the charges against him and of the time and place of hearing. Therefore, this matter is properly before the Commissioner and the Administrative Law Judge.

4. The Commissioner has complied with all substantive and procedural requirements of rule and law.

5. The Department must prove by a preponderance of the evidence that the alleged violations occurred.²⁰

6. The Commissioner may, by order, restrict, censure, suspend, revoke, or refuse to issue or renew an insurance producer's license or may levy a civil penalty or any combination of actions, for, among other causes, an agent improperly withholding, misappropriating, or converting any money or properties received in the course of doing insurance business.²¹

7. The Commissioner may, by order, restrict, censure, suspend, revoke, or refuse to issue or renew an insurance producer's license or may levy a civil penalty or any combination of actions, for, among other causes, an agent using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility whether or not involving the business of insurance in this state or elsewhere²²

8. Minnesota rules regarding insurance agents taking loans from customers state that "no insurance agent shall solicit or accept a loan from an individual with whom the agent came into contact in the course of the agent's business, unless the loan agreement or note is in writing, the lender is provided with a fully executed copy of the agreement or note at the time the loan is made, and the terms of the loan are lawful."²³ Furthermore, no insurance agent shall solicit or accept a loan under dishonest, unfair, or unconscionable circumstances considering, among other factors, the lender's capacity, the terms of the loan, provisions for collateral or security, the involvement of a neutral third party in negotiating the loan and other factors which reflect on whether the loan was dishonest, unfair, or unconscionable.²⁴ An agent who accepts or has an outstanding loan from an individual with whom the agent came into contact in the course of the agent's business, must immediately compile and maintain for at least six years after the loan has been fully repaid, a list of the individuals from whom the agent has borrowed money, together with all documentation relating to the loans and the circumstances under which each was made.²⁵

9. If the funds at issue were loans, Respondent violated Minnesota laws by accepting the loans without documenting them before or after their origination. In

²⁰ Minn. R. 1400.7300, subp. 5.

²¹ Minn. Stat. § 60K.43(4).

²² Minn. Stat. § 60K.43(8).

²³ Minn. R. 2795.0300, subp. 2.

²⁴ Minn. R. 2795.0300, subp. 3.

²⁵ Minn. R. 2795.0300, subp. 3.

addition, if the funds at issue were loans the loan was taken under dishonest, unfair, or unconscionable circumstances considering the fact that Ms. Starstead is extremely financially unsophisticated, there was no third party involvement on her behalf and there is no evidence that the loan had any terms or produced any interest.

10. If the funds at issue were not a loan, then it is reasonable to conclude that Respondent converted the funds to his own use since he did not return the funds at issue to Ms. Starstead upon her request, and produced no evidence regarding the current location of the funds.

11. Respondent violated Minn. Stat. § 60K.43(4) when he either took a loan from Ms. Starstead in violation of Minnesota law or converted her funds to his own use. For the same reason and based on the same facts, Respondent violated Minn. Stat. § 60K.43(8) by using fraudulent, coercive, or dishonest practices and demonstrating untrustworthiness and financial irresponsibility involving the business of insurance in Minnesota.

Based upon these Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends that the Commissioner revoke the Insurance Producer License of the Respondent and take other appropriate disciplinary action.

Dated: December 23, 2013

s/Barbara J. Case

BARBARA J. CASE
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Commerce (Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Michael Rothman, Commissioner, Department of Commerce, Attn: Melissa Knoepfler, Suite 500, 85 Seventh Place East, St. Paul, MN 55101, (651) 296-2715, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

This case has just one fundamental issue: whether the Department has proven by a preponderance of the evidence that the Respondent committed acts which give the Department a sufficient basis for revoking the Insurance Producer License of the Respondent and to take other appropriate disciplinary action.

There was little evidence provided on the record about what occurred with the funds at issue. Nevertheless, the Department proved that the Respondent accepted the funds at issue in the form of checks written personally to him and subsequently represented that those funds were loans made to him. Therefore, the Department has proven that the public interest will be best served and protected by the revocation of the Respondent's Resident Insurance Producer's License.

B. J. C